

Final

**RHODE ISLAND SUPREME COURT
ETHICS ADVISORY PANEL
OPINION NO. 97-14, REQUEST NO. 719
Issued July 10, 1997**

FACTS:

The inquiring attorney's client is the respondent in a discrimination case filed with the Commission for Human Rights. As a matter of course, a compliance officer at the Commission upon receiving a complaint in such a case notifies the party charged and requests the party to "submit a position paper to the Commission with a copy to the complainant and complainant's attorney (if listed below) outlining your response to the charge within twenty (20) calendar days." The inquiring attorney's client received such a letter. On behalf of the client, the inquiring attorney prepared a position paper for filing with the Commission and sent copies of it to the complainant and to the complainant's attorney. The inquiring attorney also sent the complainant and his/her attorney copies of a cover letter from the inquiring attorney directed to the compliance officer. In the letter, the inquiring attorney charged that the complaint was frivolous and urged the Commission to impose Rule 11 sanctions on the complainant, urging further that if Rule 11 does not apply to the Commission, it should adopt such a rule under its statutory rule-making authority. Complainant's attorney notified the inquiring attorney that forwarding the correspondence to the complainant was a violation of Rule 4.2, and the inquiring attorney seeks guidance from the Panel as to how he/she should proceed under these circumstances.

ISSUES PRESENTED:

Is the Commission for Human Rights' directive which requires attorneys to send copies of position papers to complainants who are known to be represented by counsel consistent with Rule 4.2., and if so, does the directive include sending such persons copies of substantive correspondences which are outside the pleadings?

OPINION:

The Panel expresses no opinion about whether the Commission's directive has the statutory authorization sufficient to meet the United States Supreme Court's test in Chrysler v. Brown, but notes that the directive may fall within the exception to Rule 4.2 which permits direct communication with a person who is represented by counsel when authorized by law. However, sending a represented party copies of extraneous materials, such as the inquiring attorney's adversarial letter to the compliance officer, which are outside the pleadings and are not properly a part thereof, is not authorized by the Commission and is therefore not permitted by Rule 4.2.

REASONING:

The anti-contact rule stated in Rule 4.2 contains an exception in situations where contact with a represented person is "authorized by law." The Rule provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The ABA Standing Committee on Ethics and Professional Responsibility has stated that the appropriate test for interpreting the term "authorized by law" which appears in Model Rule 4.2 is the test announced in Chrysler v. Brown, 441 U.S. 281 (1979). See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995). In Chrysler v. Brown, the Court rejected the argument that any agency conduct that is directed or approved by an agency head is "authorized by law." The Court held that for a government agency's regulation to have the force of law, it must be a substantive regulation which has been adopted in accordance with procedural requirements imposed by Congress and rooted in a Congressional grant of authority. A general grant of regulatory authority to an agency is not sufficient to support regulations that allow what other law forbids.

The Panel does not express a view as to whether the directive of the Commission for Human Rights, which requires attorneys to send copies of pleadings to represented parties, has the statutory authorization sufficient to meet the Chrysler v. Brown test. Such a directive would qualify as "law" for purposes of the exception in Rule 4.2 "only when embodied in formal regulations that have been properly promulgated according to statutory authority that contemplates regulation of the character in question. Were any other regulation or fiat by an agency head to be considered an authorization by law, any government agency could 'authorize' its lawyers to engage in conduct expressly prohibited by ethical codes simply by promulgating a regulation or policy." ABA Commission on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).

Assuming that sending the complainant a copy of the position paper is authorized by law, the Panel is of the opinion that also sending the complainant a copy of a cover letter which was both substantive and adversarial was not contemplated by the directive. The plain language of the directive requires attorneys to send copies of only the position paper to a represented party, and does not authorize also sending extraneous materials that are substantive which are outside the pleadings and are not properly a part thereof.